

STATE OF SOUTH CAROLINA

(Caption of Case)

Happy Rabbit, LP on behalf of Windridge
Townhomes,
Complainant,

v.

Alpine Utilities, Inc.,
Defendant.

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET
NUMBER: 2008 - 360 - S

(Please type or print)

Submitted by: Benjamin P. Mustian, EsquireSC Bar Number: 68269Address: Post Office Box 8416Telephone: 252-3300Columbia, SC 29202Fax: 771-2410

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DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition☒ Request for item to be placed on Commission's Agenda expeditiously☐ Other: _____

INDUSTRY (Check one)

NATURE OF ACTION (Check all that apply)

- ☐ Electric
☐ Electric/Gas
☐ Electric/Telecommunications
☐ Electric/Water
☐ Electric/Water/Telecom.
☐ Electric/Water/Sewer
☐ Gas
☐ Railroad
☒ Sewer
☐ Telecommunications
☐ Transportation
☐ Water
☐ Water/Sewer
☐ Administrative Matter
☐ Other: _____

- ☐ Affidavit
☐ Agreement
☐ Answer
☐ Appellate Review
☐ Application
☐ Brief
☐ Certificate
☐ Comments
☐ Complaint
☐ Consent Order
☐ Discovery
☐ Exhibit
☐ Expedited Consideration
☐ Interconnection Agreement
☐ Interconnection Amendment
☐ Late-Filed Exhibit
☐ Letter
☐ Memorandum
☐ Motion
☐ Objection
☐ Petition
☐ Petition for Reconsideration
☐ Petition for Rulemaking
☐ Petition for Rule to Show Cause
☐ Petition to Intervene
☐ Petition to Intervene Out of Time
☐ Prefiled Testimony
☐ Promotion
☐ Proposed Order
☐ Protest
☐ Report
☐ Request
☐ Request for Certification
☐ Request for Investigation
☐ Resale Agreement
☐ Resale Amendment
☐ Reservation Letter
☒ Response
☐ Response to Discovery
☐ Return to Petition
☐ Stipulation
☐ Subpoena
☐ Tariff
☐ Other: _____

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The Honorable Charles L.A. Terreni
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

RE: Happy Rabbit, LP on behalf of Windridge Townhomes v. Alpine Utilities, Inc.;
Docket No. 2008-360-S

Dear Mr. Terreni:

Enclosed for filing on behalf of Alpine Utilities, Inc. are the original and one (1) copy of the Response to Complainant's Motion to Conform to Proof in the above-referenced matter. By copy of this letter, I am serving a copy of these documents upon the parties of record and enclose a Certificate of Service to that effect.

I would appreciate your acknowledging receipt of these documents by date-stamping the extra copies that are enclosed and returning the same to me via our courier.

If you have any questions, or if you need any additional information, please do not hesitate to contact me.

Sincerely,

WILLOUGHBY & HOEFER, P.A.



Benjamin P. Mustian

BPM/cf

Enclosures

cc: Nanette S. Edwards, Esquire
Richard L. Whitt, Esquire

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2008-360-S

RECEIVED
PUBLIC SERVICE
COMMISSION

IN RE:)
))
Happy Rabbit, LP on behalf of Windridge,)
Townhomes,)
))
Complainant)
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v.)
))
Alpine Utilities, Inc.,)
))
Defendant.)
_____)

**RESPONSE TO COMPLAINANT'S
MOTION TO CONFORM TO PROOF**

Pursuant to Public Service Commission of South Carolina ("Commission") Regulation R. 103-829, and other applicable statutes, rules and regulations, Alpine Utilities, Inc. ("Alpine") herein responds to the Motion to Conform to Proof ("Motion to Conform") of Happy Rabbit, LP ("Happy Rabbit" or "Complainant"). In support thereof, Alpine would respectfully show as follows:

I. BACKGROUND

On or about September 12, 2008, Happy Rabbit which owns and operates twenty-three duplex buildings containing a total of forty-six units known as "Windridge Townhomes," commenced an action against Alpine in the Court of Common Pleas for Richland County in Civil Action No. 2008-CP-40-06619. Thereafter, on or about September 16, 2008, Mr. James C. Cook, as

“General Partner” of Happy Rabbit, filed with the Commission a letter (“Complaint”) on behalf of Happy Rabbit in the instant docket. Happy Rabbit states in the Complaint that it is “the owner and operator of Windridge Townhomes” which “receives sewer services from Alpine Utilities, Inc.” Further, Happy Rabbit asserts that “Alpine has improperly established and maintained its utility relationship with Windridge [sic]” and “requests a formal hearing so that Windridge’s [sic] concerns may be addressed by this Commission.”

On October 24, 2008, Alpine filed a Motion to Dismiss Happy Rabbit’s Complaint stating, *inter alia*, that the Complaint is defectively drawn, does not place Alpine on notice of the issues to be addressed and the relief sought, and that the assertions contained therein are not within the jurisdiction of the Commission. By way of responses filed by Happy Rabbit on or about November 24, 2008 and December 9, 2008, Happy Rabbit asserted that the Complaint was “sufficient to set forth a concise and cogent statement of the facts of its complaint and the relief sought.” By Order No. 2008-854, dated January 8, 2009, the Commission determined to hear arguments on Alpine’s Motion to Dismiss at the time of the hearing then scheduled in this matter.

Pursuant to the prefiled testimony deadlines set forth in the letter from Commission Staff dated December 22, 2008, and as revised by the Hearing Officer appointed in this docket, Happy Rabbit prefiled direct and rebuttal testimony of Mr. Cook and Alpine filed direct and surrebuttal testimony of Mr. Robin Dial. On or about February 25, 2009, Happy Rabbit requested, and the Hearing Officer granted, a continuance in the hearing previously scheduled for this matter on March 10, 2009.¹ Thereafter, on or about March 11, 2009, Happy Rabbit filed with the Commission the

¹ Happy Rabbit asserted that a continuance in the hearing date for this matter was necessary

Motion to Conform. Therein, Happy Rabbit asserts that Alpine “willfully overcharged Happy Rabbit” for sewer services rendered and requests that its Complaint be conformed so as to recover “all monies charged by Alpine and paid by Happy Rabbit, plus interest, from October 6, 2003 until the date of this Commission’s Order.” As of the date of this filing, no revised hearing date has been set in this matter.

II. MOTION TO CONFORM IS INAPPLICABLE TO THE PRESENT PROCEEDING

Alpine initially responds that a Motion to Conform is inapplicable to the present matter. Rule 15(b), South Carolina Rules of Civil Procedure (“SCRCP”) permitting amendments of pleadings to conform to the evidence states “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” The issues presented in the instant docket have not been “tried by express or implied consent of the parties” inasmuch as the Commission has not yet held a hearing in this matter; thus, none of these issues have yet to be “tried.” Moreover, the parties of record have prefiled testimony in this matter and none of the witnesses presented therein have put forth the notion that Alpine willfully overcharged Happy Rabbit or that a refund is due and owing. Additionally, Alpine has not expressly or impliedly consented to these issues being tried before the Commission. In point of fact, in responding to Happy Rabbit’s First Set of Requests for Admissions, Alpine reserved its right to

due to a then pending deposition relating to the circuit court proceeding, Alpine’s pending answers and established objections to certain discovery requests of Happy Rabbit, and Happy Rabbit’s purported need to submit additional discovery requests. Happy Rabbit did not then assert any need or request the ability to file additional testimony in this proceeding.

object “to the admission into evidence or use of any or all of its responses to [the] Requests for Admissions.” Therefore, any information in this regard is not “evidence” in that it has not been introduced into the record of this case and remains subject to objection by Alpine. Furthermore, Alpine expressly did not and does not consent to these issues inasmuch as Alpine has not been placed on notice, in either Happy Rabbit’s initial complaint, its filed pleadings, or its prefiled testimony, that such a position would be advanced by the Complainant.

III. MOTION TO CONFORM WOULD UNFAIRLY PREJUDICE ALPINE

Alpine further asserts that permitting Happy Rabbit to “conform” its complaint at this late date would be unduly prejudicial to the Company. “The focal inquiry in allowing amendment of pleadings is whether doing so will prejudice the opposing party.” Pool v. Pool, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998). “Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action.” Ball v. Canadian American Exp. Co., Inc., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (1994) (holding that referee erred by granting plaintiff’s motion to amend pleadings to assert a new cause of action). Both Happy Rabbit and Alpine have prefiled testimony and presented their arguments to the Commission in this matter and at no time has any party of record asserted the claim now set forth by the Complainant. As the Commission is aware, Alpine has consistently asserted that the Complaint filed by Happy Rabbit is vague and ambiguous, does not conform to the relevant statutory and regulatory requirements regarding complaints, and does not place Alpine on notice of the issues involved. Now, in an apparent effort to cure the defects on the face of the Complaint,

Happy Rabbit attempts to interject a wholly new cause of action at the eleventh hour. In actuality, Happy Rabbit is not seeking to “conform” its pleadings to the “facts proved;” rather, Happy Rabbit is attempting to initiate an entirely new claim. “It is proper, during the trial of a case, for the Court to allow an amendment to conform the pleading to the facts proved, **provided such amendment does not materially or substantially change the claim or defense of the party seeking the same.**” Johnson v. Finney, 246 S.C. 366, 378, 143 S.E.2d 722, 728 (1965). (Emphasis supplied). All of the parties have completed the presentation of their witnesses’ testimony in this matter and at no time has the concept of “willful overcharges” been discussed. Therefore, introduction of new claims at this time would unfairly prejudice Alpine in this proceeding.

IV. ADMISSION DOES NOT GIVE RISE TO A NEW CLAIM

In its Motion to Conform, Happy Rabbit states that “[b]ased on Alpine’s admission, it is appropriate that Happy Rabbit’s Complaint be conformed to the proof of this case, namely that Alpine has admitted that it was aware of Section 27-33-50.” However, the “proof” asserted by Happy Rabbit does not give rise to or support the newly asserted claim. First, notwithstanding the communication from Mr. Cook in 2003, Alpine is charged with full knowledge of the law, as is Happy Rabbit. Therefore, Happy Rabbit was on notice of any purported violation of the statute by Alpine at the time it originally filed its Complaint. Happy Rabbit failed to properly assert this claim and it should therefore be precluded from doing so at this late date. Second, Alpine’s response to the Request for Admission simply states that “its records indicate that James C. Cook...contacted Alpine on or about October 6, 2003 regarding Section 27-33-50.” It is unclear how an acknowledgement that

Alpine was contacted by Mr. Cook over five years ago supports a new claim for “willful overcharges.” Happy Rabbit had the opportunity to include such a claim in its Complaint when originally filed; however, it failed to timely do so. After testimony of all witnesses has been prefiled with the Commission, Happy Rabbit is now attempting to institute a new claim which, if granted, would deprive Alpine of its right to administrative due process.

Moreover, Happy Rabbit acknowledges that “Alpine was, of course, charged with the responsibility to operate its utility in full compliance with all of the laws of the State of South Carolina, without notice from a customer.” Complainant’s Motion to Conform, p. 2. Therefore, Happy Rabbit explicitly acknowledges that it has not received any new evidence which was not in its possession at the time it originally filed this action. Further, Mr. Cook, as a participant in the communication with Alpine on or about October 6, 2003, had direct, actual knowledge of the communication at the time he filed the Complaint on or about September 16, 2008. Alpine therefore asserts that Happy Rabbit’s “Motion to Conform to Proof” is simply an attempt to interject a new claim for relief which it previously omitted. Granting such a motion which has been filed after all parties of record have prefiled testimony in this matter would be prejudicial to Alpine inasmuch as the Company did not receive timely notice of this claim.

V. HAPPY RABBIT HAS NOT BEEN “WILLFULLY OVERCHARGED”

Alpine denies Happy Rabbit’s assertion that the Company “willfully overcharged Happy Rabbit in contravention of Section 27-33-50.” Regulation 103-533 relating to overcharges states:

If it is found that a utility has directly or indirectly, by any device whatsoever, demanded, charged, collected or received from **any customer** a greater or

lesser compensation for any service rendered or to be rendered by such utility **than that prescribed in the schedules of such utility applicable thereto**, then filed in the manner provided in Title 58 of the South Carolina Code of Laws; or if it is found that any customer has received or accepted any service from a utility for a compensation greater or lesser than that prescribed in such schedules; or if, for any reason, billing error has resulted in a greater or lesser charge than that incurred by the customer for the actual service rendered, then the method of adjustment for such overcharge or undercharge shall be [made by certain methods] (Emphasis supplied).

Additionally, Regulation 103-533.3 states “[i]f the utility has willfully overcharged any customer, the utility shall refund the difference, plus interest, as prescribed by the commission for the period of time that can be determined that the customer was overcharged.”

As an initial matter, Alpine would demonstrate that it has not overcharged Happy Rabbit. Alpine has only charged Happy Rabbit in accordance with its Commission approved rate schedule and Happy Rabbit has not asserted otherwise; therefore, any assertion that Alpine has “overcharged” Happy Rabbit is inapt. Additionally, Happy Rabbit has admitted it is a customer of Alpine and admitted that it receives sewer service from Alpine. See Exhibit 1, Responses to Alpine’s First Set of Requests to Admit. Therefore, pursuant to Commission regulations, Happy Rabbit is obligated to compensate Alpine for services rendered. See R. 103-534.B. Happy Rabbit acknowledges that it has paid for such services; however, said compensation was not greater than or less than that prescribed in Alpine’s applicable rate schedules. Finally, Alpine has not “willfully overcharged Happy Rabbit in contravention of Section 27-33-50” inasmuch as Alpine’s charges for services rendered to Happy Rabbit as its customer were not willfully overcharged. ‘Wilful’ (*sic*) means ‘intentional.’ ” Reeves v. Carolina Foundry & Mach. Works, 194 S.C. 403, 9 S.E.2d 919 (1940). Happy Rabbit appears to assert that Alpine intentionally contravened the prohibitions set forth in Section 27-33-50. To the

contrary, as Alpine has continually asserted in this proceeding, Section 27-33-50 does not prohibit Alpine from charging customers such as Happy Rabbit for services rendered to it. Moreover, the facilities necessary to serve in the manner so desired by Happy Rabbit are insufficient to serve in accordance with Commission regulations. Therefore, Alpine is prohibited by regulation from serving in the manner stated by Happy Rabbit. Such circumstances patently disprove Happy Rabbit's assertion that such charges made for services rendered were "willful." However, if Happy Rabbit believed that the charges submitted in this regard were unlawful, Happy Rabbit, over the past **five and one-half years since its communication with Alpine**, could have refused payment to Alpine based upon its interpretation of the statute or could have previously initiated a proceeding with the South Carolina Office of Regulatory Staff or the Commission.

VI. THE RELIEF REQUESTED WOULD RESULT IN A WINDFALL

If the Motion to Conform is granted, Happy Rabbit's claim for reimbursement, if allowed, would amount to a windfall for the Complainant. First, Happy Rabbit is requesting reimbursement of payments which it has not made. As asserted in the pending circuit court action, Happy Rabbit has admitted that it "is the present owner and operator of Windridge Townhomes...and has been so since December 29, 2005...Prior to that date, ownership of Windridge [Townhomes] was with [Carolyn C. Cook] namely through December 28, 2005." But, in its Motion to Conform, Happy Rabbit seeks to recover charges paid since October 6, 2003 – a period of time beginning more than **two years** before it was owner of the property and before it began making payments to Alpine. Prior to this time, Mrs. Cook, who is not a party to this proceeding, was the owner of Windridge

Townhomes and remitted payment for services rendered to her by Alpine. Therefore, Happy Rabbit is requesting repayment for charges it never paid and did not owe.

Further, Happy Rabbit has admitted that it is a customer of Alpine, that Happy Rabbit receives sewer service from Alpine, and that none of the tenants of Windridge Townhomes have established customer relationships with Alpine. Therefore, the relief which Happy Rabbit requests would essentially result in Happy Rabbit being reimbursed for charges rendered in connection with services which it has received over the past five and one-half years at rates approved by the Commission. Such an outcome would effectively result in Happy Rabbit receiving the benefit of free sewer service for this extended period of time at the expense of Alpine. These facts demonstrate that Happy Rabbit's request in this regard would yield a windfall for the Complainant and that, therefore, its request to introduce this claim at this time should be denied.

VII. HAPPY RABBIT HAS ACKNOWLEDGED ENTITLEMENT TO LESSER DAMAGES

Even if Happy Rabbit's request for reimbursement is appropriate, which Alpine denies, it is inconsistent with the relief the Complainant has requested in its circuit court complaint. Therein, Happy Rabbit asserts that it is entitled to recover an amount equal to Alpine's previously authorized rate over the preceding thirty-six months. Therefore, Happy Rabbit has acknowledged in its pleadings in another forum that reimbursement for charges beyond this period of time are not due and owing. The Complainant's contrary assertion in its Motion to Conform demonstrates an arbitrary disparity in its requests for relief in the forums. To the extent that the Commission is

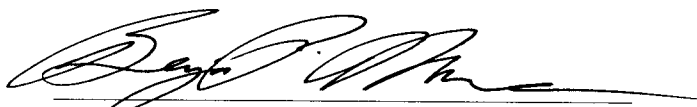
inclined to grant Happy Rabbit's Motion to Conform, the requested relief should be limited such that it may not pursue inconsistent claims in two forums.

VIII. LACK OF JURISDICTION

Alpine would respectfully reiterate and incorporate by reference herein its position set forth in its Motion to Dismiss. Happy Rabbit's claims purportedly set forth in its original Complaint and its Motion to Conform arise under Title 27 of the South Carolina Code over which the Commission does not have jurisdiction. The Commission's enabling legislation does not grant it the authority to enforce disputes arising under Title 27 of the South Carolina Code; rather, the Commission is charged with the supervision and regulation of rates and services of public utilities (See S.C. Code Ann. § 58-5-210 (Supp. 2008)) neither of which are the subject of the circuit court complaint and neither of which are asserted in the instant Complaint or the Motion to Conform. Moreover, as expressly stated in Alpine's previous pleadings, this claim is the same as Happy Rabbit's claim currently pending before the circuit court. Therefore, the Complaint should be dismissed and the Motion to Conform should be denied inasmuch as the Commission and the circuit court do not enjoy concurrent jurisdiction. Cf. S.C. Code Ann. § 58-5-270 (Supp. 2008).

WHEREFORE, for the foregoing reasons, Defendant respectfully requests that the Commission deny Happy Rabbit's Motion to Conform to Proof and grant such other and further relief to Alpine as is just and proper.

[SIGNATURE PAGE FOLLOWS]



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This 20th day of March, 2009